From: Robert E. Timlin, Jr.
To: Microsoft ATR
Date: 1/14/02 12:38pm
Subject: Microsoft Settlement

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Renata B. Hesse
Antitrust Division
U.S. Department of Justice

Dear Ms. Hesse:

I am writing as a concerned consumer to comment on, and indeed protest the proposed settlement - the Revised Proposed Final Judgment - between the United States Department of Justice (along with the nine states party to the agreement) and Microsoft Corporation. Upon review, the terms of the settlement appear wholly ineffective. There is a complete lack of punishment for Microsoft's illegal conduct, and thus no effective deterrent against similar anticompetitive behavior in the future. Also, the agreement takes no substantive corrective action to repair the harm done to the marketplace by said conduct. The preventative measures spelled out in the proposed settlement are also woefully inadequate. Specifically, it permits Microsoft to continue to control OEMs through a codified system of rewards, provides a glaring loophole to allow the company to avoid disclosing Middleware APIs, explicitly allows anticompetitive agreements, and perhaps worst of all completely fails to address Microsoft's use of its Office product to coerce Apple Computer, which the Appellate Court specifically ruled was a violation of Section 2 of the Sherman Act. Furthermore, the Enforcement provisions of the agreement can best be described as "toothless", offering no means to address willful violations by Microsoft other than going back to court, and even then the terms significantly handicap the Plaintiff's ability to prosecute said violations. Enforcement seems to depend entirely on Microsoft dealing in good faith, something which the trial record alone shows is a dubious proposition at best. This Revised Proposed Final Judgment thus completely fails to provide effective relief by the very criteria set forth in Section IV.B of the associated Competitive Impact Statement. In short, the settlement serves neither justice nor the public interest, leaving consumers completely at the mercy of an abusive monopolist. I urge the court to reject the agreement out of hand.

First, let's consider the total lack of punitive and corrective measures in the proposed settlement. Under this agreement, Microsoft suffers absolutely no consequences for its illegal conduct. There are no fines, no compensation to those directly harmed, nothing. The few mild restrictions that are placed on them can hardly be considered punitive, as most amount to nothing more than instructions to obey existing law. And since no steps are taken to undo the competitive harm inflicted on the market by Microsoft, the settlement thus allows the company to keep the fruits of its anticompetitive behavior: a near-monopoly on the Web Browser market. Netscape Communications was effectively destroyed by Microsoft's actions, and ceased to be competitive in the Browser market once it was acquired by AOL-Time Warner. The most recent figures I could find (July 2001) show that Internet Explorer holds an 87% market share. And Microsoft is even now moving to exploit this dominant position, reducing support for open standards in the latest versions for Windows, as well as silently disabling competitor's products that work with the Browser (e.g. RealPlayer and QuickTime, among others). Basically, Microsoft accomplished precisely what they set out to do with their illegal conduct, and this agreement does nothing to redress that. It is not unlike a bank robber being caught, tried, and convicted, then allowed to go free and keep the money he stole! The proposed agreement thus fails completely to act as any sort of deterrent to future anticompetitive behavior. If anything, it even encourages such actions by demonstrating that illegal conduct can be used to achieve business goals without fear of punishment or reversal. That, in a word, is wrong.

I submit therefore that the actual penalty that is to be imposed on Microsoft should include forced divestiture of the Internet Explorer Web Browser, along with a prohibition on purchasing or developing anything to replace it. This simultaneously punishes Microsoft, denies them the benefits of their anticompetitive actions, and levels the playing field for all Browser vendors, restoring competition (thus preventing the Internet

from becoming merely an extension of the Windows monopoly). Divestiture would also act as a serious deterrent to future illegal conduct, thus addressing some of the gravest shortcomings of the proposed settlement.

Next, I would like to look at some of the key preventative measures that the proposed settlement spells out, highlighting several glaring flaws that render them ineffectual, or worse. These flaws take the form of obvious loopholes, outright omissions, or even explicit sanctioning of actions that have the same impact as the anticompetitive behavior that the agreement is supposed to stop!

Consider first Section III.A, which prohibits retaliation against OEMs for a number of activities. A good provision, but it is made pointless by its final paragraph which permits Microsoft to grant Consideration to OEMs based on their level of commitment to Microsoft's products or services. Instead of punishing those that do not bow to their wishes, the agreement expressly allows the company to reward those who do. The net effect is the same.

Similarly, Section III.B mandates uniform licensing terms, thus preventing Microsoft from using discriminatory licensing to enforce its will. But III.B.3 completely undermines that by permitting discounts, programs, and market development allowances, the only requirement being that they be offered uniformly. This merely codifies a system of rewards for OEMs who toe the Microsoft line. Given the realities of the Personal Computer industry (razor-thin margins, falling sales, layoffs), every OEM is therefore highly motivated to take advantage of whatever discounts or Considerations that are made available. Few, if any, would willingly make the choice to incur higher costs by foregoing these benefits to go with products from Microsoft's competitors. The same goal is achieved as with discriminatory licensing.

Furthermore, I would like to point out that it simply defies common sense to explicitly permit market development allowances for an established monopoly. Any product that Microsoft chooses to bundle with a Windows Operating System Product automatically has access to more than 90% of the market. This is an enormous inherent advantage. The only purpose of any market development allowances would be to absolutely foreclose the possibility of competition. Permitting them in an agreement to settle an antitrust matter is absurd in the extreme.

Sections III.A and III.B thus start out as excellent measures, but the exceptions spelled out render them not only ineffective, but actually worse than doing nothing at all. Their end result would be Court-sanctioned anticompetitive practices. These provisions merely substitute positive reinforcement for punishment. It's the difference between giving your dog a biscuit and hitting him with a rolled-up newspaper; both methods serve to control his behavior. I believe that the Competitive Impact Statement's assertion that uniformly offered incentives will not discourage OEMs from favoring, promoting, or shipping products from Microsoft's competitors is incredibly naive and demonstrates a profound lack of understanding of the Personal Computer industry.

For these two measures to yield effective relief, I submit that the final paragraph of Section III.A and all of Section III.B.3 should either be removed entirely, or be re-written to expressly forbid what they allow in their present form. Further, I suggest that Microsoft be compelled to provide versions of Windows Operating System Products without bundled Microsoft Middleware. (The Competitive Impact Statement does note that this was considered but not pursued, but I urge it be re-examined.) These Windows versions would be available at a discount commensurate with the subsequent cost for OEMs to then include the Middleware of their choosing, be it from Microsoft or a third party. There would therefore be no cost penalty incurred by OEMs for selecting Non-Microsoft Middleware, and hence no built-in rewards for using Microsoft Middleware. The unfair advantage of the Windows monopoly would thus be greatly reduced.

Other provisions of the proposed settlement that cause me concern are Sections III.D and III.E, which mandate the disclosure of the APIs used by Microsoft Middleware and Communications Protocols used by Windows Operating System Products. By themselves, these seem like excellent ideas which would give third party developers the same access to core features of Windows that Microsoft's own programmer's enjoy, thereby further leveling the playing field. (The only obvious shortcoming is the 9-12 month time frame specified; that is a long time in the Personal Computer industry, at least for companies without monopoly power, so for maximum efficacy the disclosures should be required to happen much sooner.) However, Section III.J.1 provides an inviting loophole to circumvent these measures. III.J.1 states that Microsoft is not required to disclose APIs, Documentation, or Communications Protocols if doing so would compromise the security of a particular installation or group of installations of anti-piracy, anti-virus, software licensing, digital rights management, encryption, or authentication systems. On the surface, this seems reasonable. But one need only look at Microsoft's antitrust history to see how this represents a blueprint for defeating the provisions of Sections III.D and III.E.

Microsoft blatantly violated the spirit of the last Consent Decree with the DOJ by artificially integrating the Internet Explorer Web Browser with the Windows Operating System. This act of technical artifice exploited a serious loophole in the wording of the Consent Decree, rendering it ineffective and meaningless. Microsoft makes no apologies for this action and in fact maintains they did nothing wrong. Thus there is every reason to believe they would make use of such tactics again if afforded the opportunity (particularly given how successful they were). Section III.J.1 of the proposed settlement gives them that opportunity. By taking essential Middleware APIs and key Communications Protocols and artificially grafting in even basic anti-piracy, anti-virus, etc. features, Microsoft could then refuse to divulge said APIs and Protocols under III.J.1, claiming it would compromise security. Third party developers would thus continue to be denied critical information they need to effectively compete, and Sections III.D and III.E of the proposed agreement would be completely circumvented.

To reiterate, the Section III.J.1 loophole is simply an obvious application of the same technique that Microsoft used with great success to defeat the previous Consent Decree. III.J.1 seems designed specifically to permit such an exploit. While the Competitive Impact Statement maintains that III.J.1 cannot be used to withhold inherent functionality, there is nothing in the Revised Proposed Final Judgment itself that would prohibit Microsoft from doing so. I submit that in order for the provisions of Sections III.D and III.E to be effective, Section III.J.1 should be removed entirely, or at minimum extensively modified (for example, including the above referenced language from the Competitive Impact Statement) to specifically guard against the integration trick. Otherwise, history would probably repeat itself.

Still another problematic provision of the settlement is Section III.G.1. Again, it starts out very good, prohibiting Microsoft from striking deals with IAPs, ICPs, ISVs, IHVs, or OEMs requiring exclusive or fixed-percentage distribution, promotion, use, or support of Microsoft Platform Software. But as with so many of the other restrictions, an exception is included that permits anticompetitive behavior to continue unabated. Microsoft is still allowed to make agreements to require use, distribution, etc. of its software in a fixed percentage if it is "commercially practicable" for the IAP, ICP, etc. in question to use, distribute, etc. competing software in an equal or greater amount. The Competitive Impact Statement does a reasonable job of explaining how this limited exception cannot be used to exclusionary ends, but the argument breaks down completely if there is more than one competitor to Microsoft. For example, in the streaming media market, there are three major competing formats: QuickTime, RealPlayer, and Windows Media. Consider an extremely popular news Web site (an ICP) that might provide content in the QuickTime and RealPlayer formats. Under Section III.G.1 Microsoft could make an agreement with this ICP to provide content only in Windows Media and QuickTime. The terms of III.G.1 would be completely satisfied, as a

competitor's product would still be used in equal proportion to Microsoft's, and yet such a deal is clearly exclusionary, removing RealPlayer from competition. As written, Section III.G.1 explicitly allows anticompetitive behavior, giving Microsoft the power to decide which competitors would be eliminated and which would be permitted to survive. Even worse, Microsoft could structure deals with multiple IAPs, ICPs, etc. to fragment a market, choosing a different competitor to keep at each entity, but keeping its own products in universal use, distribution, etc. Network effects would guarantee the Microsoft offerings dominance and potentially extinguish all of the competitors. Obviously, for Section III.G.1 to have any real meaning, the exception must be removed. There are far too many ways Microsoft can exploit the permitted agreements to anticompetitive ends. A monopoly should not be allowed to use its monopoly profits and power to simply buy widespread acceptance of its products or services.

Perhaps the most egregious failing of the Revised Proposed Final Judgment is that it completely ignores a specific violation of Section 2 of the Sherman Act as upheld by the Appellate Court: Microsoft's use of their Office product as a "club" to force Apple Computer to adopt Internet Explorer as the preferred Web Browser (see Section II.B.4 of the Appellate Court ruling). In fact, given the definitions in Section VI of the agreement, not a single provision of the entire settlement applies to Microsoft's dealings with Apple. Apple Computer is not an IAP, ICP, ISV, IHV, or OEM as defined therein. It might be argued that Apple qualifies as an ISV, since the company does produce software, but to quote the Appellate Court in Section II.B.4 of their ruling, "Apple is vertically integrated: it makes both software (including an operating system, Mac OS), and hardware (the Macintosh line of computers)." The Court addressed Apple Computer completely separate from ISVs (as well as OEMs and the rest), thus it is reasonable to assume that in the Court's eyes Apple is not considered an ISV. Which means this proposed settlement leaves Apple Computer wide open to further abuses at the hands of Microsoft, especially where the Office product is concerned. This alone renders the agreement inadequate, without even considering the myriad other problems, as it fails completely to "avoid a recurrence of the violation" (to quote Section IV.B of the Competitive Impact Statement).

Microsoft Office is essentially a monopoly product in the office productivity space. It holds well over 90% market share, and as such is an essential software product on both Macintosh and Windows platforms. Indeed, it is a critical product for the continued survival of Apple's Macintosh line of computers. Even today with Apple's improved financial condition, Microsoft could effectively kill the company by cancelling Office for Macintosh. Office represents a gun pointed at Apple's head, and in fact Microsoft has used this threat not just once, but twice. (The first time the ultimatum was for Apple to license certain interface elements or face cancellation of the Word and Excel software packages, the precursors of Office. Apple was forced to agree to terms that paved the way for Windows to duplicate many elements of the Macintosh User Interface, without Microsoft having to pay royalties.) But even though this coercion has now been explicitly ruled to be illegal, the proposed settlement ignores that fact and leaves Microsoft free to use the tactic again. It would therefore be impossible for the Macintosh platform to compete as vigorously as it might against Windows because Microsoft can destroy it at will if they decide that Apple is becoming too much of a problem. The situation is even worse now that Internet Explorer has a virtual lock on the Web Browser market, because Microsoft can now threaten to cancel Explorer for Macintosh to extract concessions from Apple. The result would be nearly the same as with Office: the extermination of the Macintosh platform. Explorer is rapidly becoming a knife at Apple's throat to go with the Office gun pointed in its face.

I submit therefore that appropriate relief in this matter is to remove these weapons from Microsoft's hands. (If someone commits a crime with a gun, the first thing you do is take away the gun.) Divestiture of the Office product line would accomplish this, but may or may not be practical.

(As stated previously, I believe that Internet Explorer should be divested; this is more feasible considering Microsoft generates no revenue from the product, whereas Office produces a large portion of the company's income.) In lieu of divestiture, a series of restrictions must be placed on Microsoft to ensure they do not abuse the Office product. First, they should be required to produce competitive and compatible versions of Office for Macintosh as long as Apple continues producing computers. The "competitive and compatible" stipulation is necessary to preclude Microsoft from creating deliberately inferior or crippled versions of the product, and to ensure interoperability with the Windows version. (This is hardly onerous, considering that Office for Macintosh is a profitable product; this simply prevents its use as a tool of coercion against Apple.) Second, Microsoft should be required to commission under reasonable licensing terms a competitive and compatible port of the Office product to the Linux Operating System. This would remove one of the highest barriers that Microsoft has erected to keep Linux from competing with Windows, as lack of a native version of Office effectively denies Linux access to vast portions of the Personal Computer market. (Again, this does not represent a burden to the company, as Microsoft would not have to do the work, and stands to reap considerable profits from each copy of Office for Linux that would be sold.) Third, similar to the terms of Section III.D of the proposed settlement, Microsoft should be required to disclose and document all of the APIs used by the Office software to interoperate with a Windows Operating System Product. This would help promote competition in the office productivity space by leveling the playing field for all developers. Finally, to that same end, and perhaps most importantly, Microsoft should be required to disclose and document all file formats used by the Office software, making them freely available for anyone to use in their own products. This alone would go far in removing barriers to competition, as file compatibility is one of the primary factors which prevents users from exploring alternatives to Office. Even without divestiture, these four measures would effectively end the use of Office both as a weapon of coercion against Apple and as a tool of monopoly maintenance, as well as encouraging competition in the office productivity market.

Next, let's examine the provisions for enforcement in Section IV. As with the rest of the Revised Proposed Final Judgment, there are some good points, but serious flaws and omissions overshadow them. Foremost among these are the lack of immediate enforcement authority and prescribed penalties for willful violations. If Microsoft chooses to engage in anticompetitive conduct prohibited by this settlement, the only remedies available are voluntary resolution through the Internal Compliance Officer or through court action as described in the Competitive Impact Statement. Neither offers an effective deterrent to violations.

First, consider the nature of the Internal Compliance Officer; he or she is to be a Microsoft employee. The factual record of this case clearly shows that many of Microsoft's anticompetitive policies originated with senior management, among them Bill Gates himself. If further such practices were mandated from the top, is it reasonable to believe that a simple employee who is afforded no protection whatsoever from retribution by this agreement would dare oppose them? Furthermore, even if the Compliance Officer chose to make a stand against such illegal conduct and was not fired on the spot and replaced with someone more pliable, he or she is granted no real power to forcibly stop the conduct. The entire idea of voluntary resolution through a Compliance Officer seems predicated on the notion that Microsoft actually wants to comply and avoid further anticompetitive behavior. I believe the record shows this to be a naive and dangerous assumption.

Microsoft willfully and blatantly violated the spirit (if not the letter) of the first Consent Decree with the DOJ. The company has lied to its developers and customers, coerced competitors, and bullied its partners. During the trial in District Court, Microsoft repeatedly demonstrated contempt for the proceedings and indeed the very notion that the Law has any say whatsoever over its business practices. The company was even caught falsifying evidence in Federal Court! As the trial went badly, Microsoft turned to public relations firms to write fake letters of support in an

attempt to create the illusion of broad grass-roots backing for the company's position, the idea being to manipulate public opinion to influence the outcome of the trial. At one point they even stooped to sending letters in the names of deceased individuals! And obviously the tactic has not been forgotten, for recently it was discovered that Microsoft had submitted falsified testimonial letters to the European Union commission currently investigating alleged anticompetitive abuses by the company. And Microsoft continues to misrepresent facts in the matter at hand, failing to disclose lobbying activity related to this proposed settlement in its APPA filing, when extensive lobbying by the company has been amply documented in the media! To this day Microsoft remains unrepentant and denies that its actions were wrong, despite the findings that were upheld by the Appellate Court. Given this record of dishonesty, disregard for the Law, and utter lack of remorse, it seems completely unreasonable to now simply trust that Microsoft will police itself, or even believe that it in fact has any desire to do so.

That leaves court action brought by the Plaintiffs to address willful violations of the settlement. This has proved ineffective in the past, as the case of the original Consent Decree between Microsoft and the DOJ shows. Even when threatened with the unprecedented fine of one million dollars per day, the company was not cowed (unsurprising since their monopoly generates billions of dollars in profits each quarter). Plus, the company escaped punishment for their violation of the Decree completely upon appeal. Thus the threat of court action, with its attendant process of appeals and likelihood of only fines being imposed even if prosecution is successful, does not act as a deterrent against willful disregard of the provisions of the Revised Proposed Final Judgment. Appeals can drag the enforcement proceedings out long enough for anticompetitive acts to achieve their ends, and as before, any potential fine is likely to be insignificant compared to the sheer size of monopoly profits (not to mention Microsoft's staggering cash holdings, which presently amount to roughly $36 billion and counting).

What is required to ensure voluntary compliance on Microsoft's part is an independent, external authority with the power to immediately act to remedy violations, triggering the imposition of prescribed penalties severe enough to make the company fear them. The Technical Committee as established by Section IV.B of the proposed settlement could be such a body, but the agreement fails to give it the necessary enforcement powers. The TC is limited to working through the Internal Compliance Officer or referring the matter to the Plaintiffs to pursue through the courts, both of which are likely to be of dubious value, as outlined above. Furthermore, Section IV.D.4.d makes even court action difficult by prohibiting the TC from either testifying or submitting evidence in any enforcement proceedings. This restriction seems wholly unreasonable as it only serves to further prevent expeditious enforcement. The Competitive Impact Statement notes that the TC can provide information to the Plaintiffs upon which to base an enforcement investigation, but why mandate such extra steps when the TC can directly verify non-compliance for the Court? This makes no sense, and would only serve to prolong the duration of any violations. At minimum, IV.D.4.d should be removed. (Note that this would not compromise confidentiality of materials obtained by the TC, as this is specified separately.) Ideally, since time is critical in addressing any anticompetitive behavior, the TC should be empowered to immediately invoke harsh penalties, either directly or via the Plaintiffs, to stop willful non-compliance. These penalties should be prescribed in advance and severe enough to nullify and reverse any advantage that might be gained by illegal conduct. This might include forced divestiture of products, or perhaps forced disclosure of the source code for the Windows Operating System. The point being that Microsoft would actually fear punishment, and find it in their best interests to comply rather than continue their anticompetitive ways.

Lastly, the final major problem with the Revised Proposed Final Judgment is found in Section V. The specified five-year duration of the agreement is far too short for conduct remedies (even the more far-reaching ones that I

have suggested) to fully restore competitive conditions to the marketplace. While the Personal Computer industry is rapidly evolving, Microsoft is a thoroughly entrenched monopoly, and five years represents at best two major upgrade cycles. It is a short enough time that the company can simply "wait it out" (as they have managed to do thus far during the four-year course of these antitrust proceedings) and still wield monopoly power when the restrictions expire. I submit that the conduct remedies should remain in force for a period of ten years. This would allow ample time for competition to flourish and make it nearly impossible for Microsoft to simply bide its time waiting for the Judgment's expiration. Also, the Plaintiffs should be entitled to seek multiple extensions to the term of enforcement so long as there is evidence of willful, systematic violations of the agreement (or associated illegal conduct), rather than the one-time extension stipulated in Section V.B. Again, this is to prevent Microsoft from simply "running out the clock" so it could continue with anticompetitive behavior unhindered.

In conclusion, I believe it to be abundantly clear that the Revised Proposed Final Judgment would be completely ineffective in restraining and redressing Microsoft's anticompetitive behavior. What good provisions there are have been rendered impotent by loopholes and exceptions. This agreement is a failure by the DOJ's own criteria as presented in Section IV.B of the Competitive Impact Statement: (1) it does not end the unlawful conduct (and in some cases officially sanctions alternate forms of it); (2) fails to prevent recurrence of violations (especially regarding the coercion of Apple Computer); and (3) does absolutely nothing to undo the anticompetitive consequences, in particular leaving Microsoft in control of the Web Browser market, control obtained through largely illegal means (as upheld by the Appellate Court). Furthermore, the enforcement provisions are weak at best, completely devoid of meaningful penalties for continued anticompetitive acts. Enforcement seems to hinge entirely on the good faith of a company that has repeatedly demonstrated untrustworthiness. Quite simply, under this proposed settlement Microsoft faces no punishment for its past crimes and no deterrent to future ones.

In order to provide effective relief to the marketplace, I urge consideration of the suggestions that I have submitted in this commentary. I believe the additional measures and elimination of exceptions and loopholes in the proposed settlement fall well within the scope of the Appellate Court's ruling, and would more successfully undo the harm inflicted by Microsoft's actions, prevent further violations, and restore competition. Even though it is probable that additional, lengthy litigation would be required, the time and effort to ensure appropriate remedies is more than warranted. A quick but ineffective settlement such as the Revised Proposed Final Judgment accomplishes nothing and leaves one of our most important industries trapped beneath the heel of an abusive monopolist.

For the record, I would like to state that I am not employed in the Personal Computer sector and am in no way affiliated with Microsoft or any of its competitors. I have no axe to grind. I do follow the industry though, as computers have been a hobby of mine for nearly 20 years. I work in higher education and manage the computer systems for my department. These consist of a variety of platforms including Windows, Macintosh, Linux, and Unix. Based on my personal experience, almost without exception I would never willingly choose to use any Microsoft product. Yet I am frequently forced to, directly or indirectly because of their monopoly power. As a consumer I am denied choice. This is the harm that is at the core of this case. Now that Microsoft stands convicted of the anticompetitive tactics it has employed for so long, there is the opportunity to pursue potent remedies to restore competition and choice to the marketplace, allowing innovation to flourish. If instead the Department of Justice chooses to proceed with this completely ineffective settlement, then nothing will change and the DOJ will have failed in its duty to the American people.

Respectfully submitted,

Robert E. Timlin, Jr.

P.S. Please note that I have also faxed a copy of this document. This electronic version is provided for your convenience.